

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For the Period
From July 1, 1966
Through September 30, 1966

VOLUME 124

RICHMOND M. FLOWERS, Attorney General



MONTGOMERY, ALA.
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QUARTERLY REPORT
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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from July 1, 1966 through September 30, 1966, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS

Attorney General

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OPINIONS

July 5, 1966

Dr. Ira L. Myers, M. D.,
State Health Officer
State Office Building
Montgomery, Alabama 36104

State Board of Health — Insurance — Physicians — Nurses

The cost of malpractice insurance for nurses or physicians
may not be paid from public funds.

Opinion by Assistant Attorney General Robert Miller.

Dear Sir:

I have your letter of May 13, 1966 in which you ask:

"May the cost of malpractice insurance for nurses and/or physicians be included in the cost of the Medicare Program and be paid from public funds either directly or repaid by reimbursement?"

Among all the objects sought to be secured by the formation of governments, none is more imperative nor more inherently a part of the police power than is the preservation of the public health. Nevertheless, the general rule is that boards of health and health authorities have only such powers as are conferred upon them by statute, either expressly or by necessary implication. See 25 Am. Jur., Health, §11.

Thus, although this office has conducted an exhaustive search in an effort to find authority, either directly or by implication, whereby the cost of malpractice insurance for nurses and physicians may be paid from public funds, no such authority has been found. It is my opinion that additional legislation would be required in order for the State Board of Health to exercise such authority.

In numerous informal letters and official opinions, this office has denied the authority of administrative agencies to pay for liability insurance to cover their employees out of public funds. The reason lies in the fact that the State itself and its agencies are not liable in tort. Constitution of Alabama of 1901, §14, and **White v. Alabama**, 138 Ala. 479, 35 So. 454, **Moore v. Walker County**, 236 Ala. 688, 185 So. 175, **Laney v. Jefferson County**, 249 Ala. 612, 32 So. 2d 542, and **Garrett v. Escambia County Hospital**, 266 Ala. 201, 94 So. 2d 762. See also Quarterly Report of the Attorney General, Vol. 78, pages 56 and 73.

Furthermore, the general rule is that public officers (including State Board of Health doctors and nurses) are not personally liable in civil actions for damages to third persons, if such damages resulted from actions within the line and scope of the officer's employment. See 24 ALR, pp. 798-808, and 25 Am. Jur., Health, §17.

This is not to say that public office or employment may be made a shield to protect careless officials from the consequences of their

misfeasance in the performance of their public duties, but neither does it follow, in the absence of express statutory authority, that there is a necessary implication that the legislature intended that public funds be expended to protect its employees from the natural results of their unreasonable, arbitrary, malicious, and personal misfeasance done outside the line and scope of authority conferred upon them.

This opinion is not intended to overrule the opinion directed to the Mayor of the City of Montgomery on January 14, 1957, Quarterly Report of the Attorney General, Vol. 86, p. 7.

In the first place municipalities ordinarily carry liability insurance to cover damage caused by their employees when engaged in the proprietary functions of the city. Besides this, it was pointed out in that opinion that:

"The Attorney General is the attorney for state agencies and as such represents them, but this is not true as to cities for they have to employ their own counsel and in many instances expend considerable sums of money in the defense of suits arising out of motor vehicle operations, whether such suits are groundless or not. It costs the city money in many instances to establish in court its governmental immunity from liability for the negligence of its employees or agents. In other cases, questions of fact are presented which have to be litigated to decide whether or not the case is one to which is applicable the doctrine of governmental immunity."

Furthermore, it may be noted that the relief provided through the Board of Adjustment, Title 55, §§333-344, Code of Alabama 1940 (Recompiled 1958), for damages caused by employees of State agencies is limited so as not to include damages caused by employees of municipalities. **State Board of Adjustment v. Lacks**, 247 Ala. 72, 22 So. 2d 377.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 14, 1966

Hon. Perry O. Hooper
Judge of Probate
Montgomery County
Montgomery, Alabama

Elections — Voters — Ballots.

When a voter makes an (X) mark under a party emblem on a ballot and also makes an (X) mark before the name

of a candidate in another column, the vote for the individual candidate is a legal vote and should be counted for that candidate.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of July 6, 1966, is as follows:

"Since it is my responsibility to hold a school of instruction for those who will conduct the election this November, I would like to have the following question answered:

"On an absentee paper ballot when a voter makes an (X) mark under a party emblem on a ballot and then makes an (X) mark before the name of a candidate in another column, should this ballot be counted for the individual candidate voted for?"

My answer to your inquiry is in the affirmative.

Title 17, Section 157, Code of Alabama 1940, reads as follows:

"§ 157. To vote a straight party ticket.—If the elector desires to vote a straight ticket, that is, for each and every candidate for one party for whatever office nominated, he shall mark a cross mark (X) in the circle under the name of the party at the head of the ticket."

As hereinafter indicated, the Courts of this State have held that this section is not mandatory upon the voter and is merely a provision for the convenience of the voter, but a ballot voted in the manner other than prescribed in Section 157 is a legal and proper ballot.

Title 17, Section 193, Code of Alabama 1940, reads as follows:

"§ 193. Count of votes; by whom and how made.—In counting, the returning officer or one of the inspectors, must take the ballots, one by one, from the box in which they have been deposited, at the same time reading aloud the names of the persons voted for, and the office for which such persons are voted for; they must separately keep a calculation of the number of votes each person receives and for what office he receives them; if the elector has marked more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the elector's choice for any office to be filled, his ballot shall not be counted for such office, but this shall not vitiate the ballot so far as properly marked, **nor shall any ballot be rejected for any technical error which does not make it impossible to determine the elector's choice**, and nothing in the election law shall be construed so as to prevent any elector from voting for any qualified person other than those whose names are printed on the ballot." (Emphasis supplied.)

The Courts of this State have uniformly held that technical errors committed by voters which do not make it impossible to determine the choice of the voter or impossible to determine the candidate for whom the voter intended to cast his ballot will not bring about the loss of this person's vote on account of the technicality. **Garrett v. Cunningham**, 211 Ala. 430, 100 So. 845; **Montgomery v. Henry**, 144 Ala. 629 (635), 30 So. 507; **Wilkerson v. Cantelou**, 165 Ala. 619, 51 So. 799.

In short, the effect of the cases hereinabove cited is that no ballot should be rejected for any technical error which does not make it impossible to determine the elector's choice. In the situation presented in your request, it would appear to the election officials that the person casting the ballot has clearly indicated a choice to cast his ballot for the individual candidate whose name does not appear under the party emblem under which the voter made an (X) mark.

There is no doubt, in the situation here considered, that the voter intended to vote for all of the candidates appearing under the party emblem under which he has made an (X) mark, with the exception of the individual candidate appearing in another column before whose name he has also made an (X) mark.

You are, therefore, advised that ballots marked in the manner set out in your request is a legal ballot and the election officials should give to the individual candidate the vote cast for him by this type of ballot.

In your request you make inquiry as to the casting of absentee ballots, but this opinion may be considered as controlling any paper ballot whether it be an absentee ballot or a legal ballot.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

July 15, 1966

Honorable P. M. Johnston
City Attorney
City of Aliceville
Aliceville, Alabama

Leases — Municipalities — Words and Phrases.

1. A municipality may, by ordinance, regulate the conditions under which the public may use property leased by the municipality as a garbage disposal area.
2. Property "belonging to" a municipality within the meaning of Title 37, Section 9, Code of Alabama 1940, includes property leased to the municipality.

Opinion by Assistant Attorney General Gish.

Dear Mr. Johnston:

Your request for an official opinion, dated June 16, 1966, is as follows:

"The City of Aliceville, Alabama, has leased a tract of land some five miles from the City limits to be used as a garbage dump. The City Council desires to pass some ordinances regulating the conditions under which this area may be used by the general public, and prescribing penalties for violations of the ordinances.

"I find a line of cases setting forth the principal that 'A municipal corporation may exercise only the powers granted in express terms, those necessary or fairly implied in or incidental to the powers expressly granted, and those indispensably necessary to the accomplishment of the objects of the municipality.' Please advise me if the term 'belonging to the City' as it appears in Title 37, Section 9 would include property leased to the City for the purposes of an ordinance of this type."

Title 37, Section 496, Code of Alabama 1940, as amended by Act No. 61, General Acts of Alabama 1947, page 26, which authorizes municipalities to establish and maintain crematories and other areas for the disposal and destruction of garbage and trash, is sufficiently broad to empower such municipalities to lease such areas.

Title 37, Section 9, Code of Alabama 1940, reads in part as follows:

"Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way **belonging to** the city or town." (Emphasis supplied.)

The words "belonging to" are susceptible to more than one meaning, depending upon the context in which they are used, and may mean less than an absolute and unqualified title, such as the absolute right of use. See **Board of Supervisors of Wythe County v. Medical Group Foundation, Incorporated**, 204 Va. 807, 134 S. E. 2d 258.

Therefore, I am of the opinion that the statutes cited hereinabove authorize the City of Aliceville to regulate, by ordinance, the conditions under which the property leased by the municipality as a garbage disposal area may be used by the public.

Premises considered, your question is answered in the affirmative.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 8, 1966

Dr. Ira L. Myers, M. D.
State Health Officer
State Office Building
Montgomery, Alabama

Health and Health Department — Officers and Offices.

A county health officer is required by established public policy to devote all of his time to the duties of his office.

Opinion by Assistant Attorney General Robert F. Miller.

Dear Sir:

Your letter of August 1, 1966, reads as follows:

"Rule II, Section 5(e) of the Rules and Regulations of the Merit System for County Health Services, Alabama State Department of Health reads as follows:

" No employee in the classified service shall be a member of any national, state, county, or municipal committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

"Officials in Marshal County wish to employ Dr. Andrew G. Findlay, who was elected to a position as City Councilman and is now serving as such in the city of Guntersville, Alabama, as Health Officer for Marshall County.

"May such an appointment be made? If it were made could Federal funds be allocated to the Marshall County Health Department for financing its public health program?"

The answer to your first question is contained in a letter from this office to the Superintendent of the Fayette County Board of Education written on September 22, 1958. The question asked was whether a member of the Fayette County Board of Education could also be the county health officer.

The answer was stated as follows:

"In an opinion of this office reported in Quarterly Report of Attorney General, Vol. 70, page 11, under date of January 15, 1953, this office pointed out that under Section 703, Paragraph (e) of the Code of Alabama 1907, the county board of health elected a county health officer, removable at pleasure. There was no provision that he should devote his full time to his position. By Act No. 658, General Acts 1919, page 909, said Section 703 was amended. The county board of health, under the amendment, continued to elect

the county health officer, subject, however, to the approval of the State Committee of Public Health, and it was provided that the county health officer 'shall devote all of his time to the duties of his office.' By Section 7 of said Act, the officer of part-time county health officer was abolished.

"Under Section 8(5), Title 22, Code of Alabama 1940, the county board of health elects a county health officer subject to the approval of the State Committee of Public Health, 'who shall devote all of his time to the duties of his office, and to fix his term of office at not less than three years, in such counties of the State as shall, through their proper authorities make appropriations for full-time public health service.' By Section 12 of said Title 22, it is also provided that the county health officer shall devote all of his time to his official work.

"It is my opinion, therefore, from what has been said above, that there is now no provision in the law for a part-time county health officer."

This opinion in regard to a county health officer - board of education situation applies equally well to a county health officer - city council situation. Public policy, as expressed in the statute, precludes a county health officer from devoting a part of his time to the duties of a city councilman.

This negative answer to your first question disposes of your second question.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

August 17, 1966

Dr. R. O. Laffre, Jr., D.M.D.
Secretary-Treasurer
Board of Dental Examiners of Alabama
200 S. Monterey Street
Mobile, Alabama

Dentists — Health — Schools

1. Persons practicing dentistry in Alabama must be licensed by and currently registered with, the Board of Dental Examiners. Additionally if they are seeing patients on a fee basis they must have the business license required by Title 51, §504, Code of Alabama 1940, as last amended by Act No. 59, H. 198, Acts of Alabama 1961, Special Session, p. 1927.

2. Dentists employed by the United States Army, Navy, Air Force, or other armed services, Public Health Service, Coast Guard, or Veterans Administration are exempt from the application of Act No. 100, S. 68, Acts of Alabama 1959, p. 569, while engaged in the discharge of their official duties.

3. Section 13 of Act No. 100, S. 68, Acts of Alabama 1959, p. 569, does not prevent dentists who are duly licensed and currently registered by the Board of Dental Examiners from working for State and County educational and health agencies.

Opinion by Assistant Attorney General Robert Miller.

Dear Sir:

Your request for an official opinion bearing date of July 7, 1966 is as follows:

"This Board seeks your advice and opinion concerning several questions of law which have come to our attention. These are:

- " 1. **State Privilege Licenses.** According to Section 504 of Title 51, Code of Alabama, 1940, as amended, the only exemption is that a dentist shall have practiced his profession for more than two years before being required to purchase a privilege license. Are dentists employed by state, county, community, departments of health, hospitals, institutions and clinics also exempt? Are dentists employed as instructors on the clinical staff of dental and other schools also exempt, even though they may see patients on a fee basis within the confines of schools, hospitals, institutions, etc., under control of the school?
- " 2. **Public Health Activities.** Section 11 of the Dental Practice Act lists the exemptions of certain practices and operations. Article 2 of this section exempts the practice of dentistry in the discharge of their official duties by graduate dentists or dental surgeons in the U. S. Army, Navy, Air Force, or other armed services, public health services, Coast Guard, or Veterans Administration. Are we correct in assuming that dentists, dental hygienists, and dental assistants employed by federal, state, county, community, and volunteer health agencies while performing their duties for the people of the state of Alabama, are not exempt from the Dental Practice Act under this section?
- " 3. **Proprietor.** Section 13 of the Dental Practice Act exempts state institutions from the definition of a proprietor. Would county school systems, individual schools in a county school system and state, county and community educational and health agencies be unlicensed proprietors?

"This Board realizes that the future practice of dentistry in the state of Alabama will be greatly influenced by the ever expanding

functions of state, county, and community public health agencies and the ever increasing funds available through the Federal Government. In order for us to plan intelligently and avoid some of the problems that we can anticipate in the years ahead, we feel the need of answers to the above questions and any advice you could give."

The dental practice act referred to in your letter was last enacted as Act No. 100, S. 68, Acts of Alabama 1959, p. 569, approved June 24, 1959. It may be found in Title 46, §§120(1) et seq., Code of Alabama 1940 (Recompiled 1958), Cumulative Pocket Part. It will hereinafter be referred to as Act 100.

Title 51, §504, Code of Alabama 1940 was last amended by Act No. 59, H. 198, Acts of Alabama, Special Session 1961, p. 1927, approved September 15, 1961. It will hereinafter be referred to as §504.

These acts are separate, but they must be read together. In my opinion, §504 requires a business license, while Act 100 requires a professional license. In addition to these two licenses, municipalities may also require dentists who are engaged in the public practice of dentistry to pay a third license.

In reference to your first question, it is my opinion that dentists employed by the State, a county, a community, departments of health, hospitals, clinics, and institutions other than dental colleges, whether or not seeing patients on a fee basis, are required by Act 100 to be duly licensed and registered annually by the Board. See §19 of Act 100 which states: "No person shall practice dentistry in the State of Alabama unless licensed by the Board and registered annually as required by this Act."

Furthermore, if any such dentist is seeing patients on a fee basis, he must, in addition to his professional license, also have the license required by §504, provided he has practiced dentistry for two years.

In my opinion the exemption provided by §504 does not apply to Act 100, in other words, any person practicing dentistry in Alabama must be duly licensed and registered by the Board, unless exempt by some provision of Act 100; and after two years of practicing dentistry, either here or elsewhere, for a fee or not, if he then should see patients on a fee basis, he would be required to have two or maybe three licenses.

In regard to dentists employed as instructors in dental schools, §12 of Act 100 provides that the Board may issue a teaching permit, in lieu of a license, to a person who holds a dental degree, provided he be annually certified by the dean of a dental college as a bona fide member of the faculty, and provided further that he only practice dentistry within the facilities of the dental college as an adjunct to his teaching functions. Such permits are valid as long as the teacher

remains a member of the clinical faculty of such dental college, and need not be renewed annually. Should he see patients on a fee basis he would be, in my opinion, in violation of both Act 100 and §504.

In regard to your second question, paragraph 2 of §11 of Act 100 gives a specific exemption to employees of "the United States Army, Navy, Air Force, or other armed services, Public Health Service, Coast Guard, or Veterans Administration." In my opinion, this exemption, being expressly limited to United States employees in the listed federal institutions, would not apply to dentists employed by the State, a county, a community, or volunteer health agencies and such employees would not be exempt from the requirements of Act 100. And furthermore, this exemption as to certain federal employees is qualified so that it applies to such employees only "while in the discharge of their official duties." I am of the opinion that, if such employees should render professional dental services outside the discharge of their official duties, for a fee or gratuitously, they would be subject to the provisions of Act 100.

In reference to your third question, county school systems, individual schools in a county school system, and State and county educational and health agencies are not unlicensed proprietors. This is because §13 of Act 100 exempts State institutions from the meaning of the term "proprietor," and because State and county educational and health agencies are State institutions. See Title 52, §14 and §34, and Title 22, §§7 and 8, Code of Alabama 1940 (Recompiled 1958), the enabling statutes creating such State institutions. Compare **Hard v. State**, 228 Ala. 517, 154 So. 77, and **Turk v. County Board of Education**, 222 Ala. 177, 131 So. 436.

It is noted that §13 of Act 100, *supra*, provides:

"A licensed dentist or dental hygienist who enters into any of the above described agreements with an unlicensed proprietor may have his license and license certificate suspended or revoked by the Board."

Section 13 generally defines a proprietor as any person who employs a dentist or places him in possession of dental equipment. Thus if State agencies or institutions were not excluded from the thrust of §13, no dentist could work for any State agency or institution.

In my opinion Act 100 does not prevent dentists duly licensed and currently registered by the Board from working for the State institutions listed in your third question.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 8, 1966

Dr. Ira L. Myers, M. D.
State Health Officer
Department of Public Health
State Office Building
Montgomery, Alabama

Physicians — Chiropractors — Health Department

The basic law in regard to death certificates requires that they be signed by a physician, a person legally authorized to practice medicine; and a chiropractor is not entitled to sign one of these certificates.

Opinion by Assistant Attorney General Robert F. Miller.

Dear Sir:

Your letter of August 19, 1966, reads as follows:

"I have received an inquiry from a Chiropractor, copy attached, requesting a ruling on whether a Chiropractor is entitled to sign the medical certification of a cause of death on a death certificate.

The practice has been for us to accept this only from legally licensed physicians, coroners, county health officers, or sheriffs.

"Your considered opinion of this matter is earnestly solicited."

Attached to your letter is a copy of a letter sent to you by Dr. Robert Ticen, which is as follows:

"I am happy to report our x-ray unit will be equipped with an additional 1.5 mm of aluminum filter, as requested by your office, the filter has been ordered and will be in service as soon as the factory will supply it.

"We are happy to cooperate with the State Department of Health. But to cooperate, it takes both sides to do what is right and obey the laws of Alabama, the doctor and the State Department of Health.

"I would call your attention to the Shelby County Health Department, Columbiana, Alabama, refused to issue a Burial Permit on a certificate signed by myself. This was last April 8, 1966.

"Mrs. Fay Benton Roberts, Secretary, Shelby County Health Dept., refused to issue the Burial Permit for John Purifoy, R. R. 1, Shelby, Alabama, with the following statement, 'This certificate was not signed by a practicing physician, coroner, County Health Officer or the Sheriff and is not acceptable for filing.'

"I practice as a 'Chiropractic Physician' under a license issued by the Healing Arts Board of Alabama. And under the law, I am

attending to the public who seek my service, who are ill and need the help of a physician.

"According to Webster's dictionary, a physician is a person skilled in physic or the art of healing. And 'physic', the noun, is defined as the art of healing diseases. Limiting the word physic to medical science is termed 'archaic' according to the same dictionary. Even the verb form of the word 'physic' carries the definition: 'to relieve; heal; cure.'

"We feel the 'Attending Physician' covers the Chiropractor and the Medical Doctor, under the laws of Alabama. Therefore I would like for you to give your views on this.

"We are looking forward to your cooperation to clear up this misunderstanding."

The question then is whether a chiropractor is entitled to sign a death certificate. In my opinion the answer to this question is in the negative.

Title 22, Section 25, Code of Alabama 1940, as last amended by Section 5 of Act No. 492, General Acts of Alabama 1943, page 457, provides, among other things, "The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased." If this were all that is contained in the Code in regard to filing a death certificate, then Dr. Ticen's argument might have some validity. His argument fails however because the statute goes on to define the word "physician." The sixth definition of Section 19, Title 22, Code of Alabama 1940, as last amended by Section 1 of Act No. 492, supra, is as follows: "'Physician' means a person, legally authorized to practice medicine in this state."

Title 46, Article 3 in the pocket part of the Code of Alabama, as recompiled in 1958, contains the law in regard to Physicians, Osteopaths, and Chiropodists. Section 259 thereof states, among other things, "An applicant for a certificate of qualification to practice medicine . . . in this state . . . must present . . . a diploma showing graduation from a medical college approved by the state board of medical examiners . . ."

The law in Alabama in regard to chiropractors, is found in Title 46, Article 4, Code of Alabama 1940. In Section 297 (1) thereof, "chiropractic" is defined as follows:

"The term 'chiropractic', when used in this article, is hereby defined as the science and art of locating and removing without the use of drugs or surgery any interference with the transmission and expression of nerve energy in the human body . . ."

Section 297 (1) of Article 4, supra, provides:

"Chiropractors are expressly prohibited from prescribing or administering to any person any drugs included in materia medica,

except as herein provided, from performing any surgery, from practicing obstetrics, or from giving X-ray treatments, or treatments involving the use of radioactive materials of any description."

Section 297(9) of Article 4, supra, provides:

"Chiropractors shall not prescribe or administer medicine to patients, perform surgery, nor practice obstetrics or osteopathy."

I find, therefore, that in Alabama, a chiropractor is not a physician and is not authorized to practice medicine in Alabama; and, since the basic law in regard to death certificates requires that they be signed by a physician, "a person legally authorized to practice medicine," I am of the opinion that a chiropractor is not entitled to sign a death certificate.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 9, 1966

Honorable K. B. Hill
Tax Assessor
Tuscaloosa County
Tuscaloosa, Alabama 35401

Ad Valorem Taxes — Assessment — Homestead Exemption

1. Requirement that ad valorem taxes be assessed to owner, means general or beneficial owner.
2. Definition of homestead by Constitution and laws of Alabama discussed generally.

Opinion by Assistant Attorney General Payne.

Dear Sir:

Your request for an official opinion of this office dated August 26, 1966, is as follows:

"Homestead exemptions, as defined by the constitution and laws of the State of Alabama, are exemptions from all state ad valorem taxes as provided in Title 51, Sec. 15.

"The question arises as to just who is entitled to a Homestead exemption? It is my understanding of this section that the owner of the property and/or home, upon his assertion, is entitled to this homestead exemption. What constitutes ownership in this regard?

In this county we have Warranty deeds, bond for title, and even Agreement for deeds, all of which are presented to this office for claiming homestead exemptions. Will the State accept these deeds as sufficient evidence for claiming homestead exemption?

"Your opinion will be appreciated."

As stated in the first paragraph of your letter, Title 51, Section 15, Code, Recompiled 1958, exempts homesteads, "as defined by the Constitution and laws of the State of Alabama," from state ad valorem taxes to the extent set out in the section. Under this section, the elements necessary to constitute the property sought to be exempt as a "homestead" must necessarily be determined by the definition of the quoted term as defined by the Constitution and laws of the state. This phase of your request will presently be discussed in connection with the decisions of the Alabama Supreme Court on the subject.

The situation relative to whom property must be assessed for ad valorem tax purposes obviously must be determined by the laws of this state relating to the assessment of those taxes. I gather, from what you have stated above, that the divers written instruments presented to you by various individuals claiming the homestead exemption perplexes you as to just what constitutes "ownership" in this regard. The appellate courts of the state have held that the ad valorem tax laws requiring property to be assessed to the **owner** thereof, means the general or **beneficial** owner. In **Ken Realty Co., Inc. v. State**, 247 Ala. 610, 25 So. 2d 675, the Alabama Supreme Court quoted from the case of **State v. White Furniture Co.**, 206 Ala. 575, 90 So. 896, thusly:

"So, when a statute requires that property be assessed to the owner, we think it means the general and beneficial owner—that is, the person whose interest is primarily one of possession and enjoyment in **contemplation of an ultimate and absolute ownership**—'" (Emphasis supplied)

"It is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner.'" (Citations omitted)

The above principles were followed also in **Crow, Tax Collector v. Outlaw**, 225 Ala. 656, 657, 145 So. 133.

Hence, it would appear that where an individual is in such possession and enjoying the use of property under the circumstances outlined above, he would be liable for assessment of ad valorem taxes against the property. However, it must be borne in mind that this would depend upon the nature of the instrument presented to you and the facts existing in connection with said instrument. The very fact that the individuals in question are claiming the exemption under the various instruments presented, indicates to me that they feel liable for the taxes on the property presumably referred to in said instruments.

We come now to the question as to just what is necessary to constitute a valid claim of "homestead." One of the essential elements to a valid claim of homestead is that of **actual occupancy**. Biennial Report of Attorney General, October 1, 1936 — September 30, 1938, Page 310. This "occupancy" may in a proper case be constructive, as by a temporary absence but with the intention to return, depending upon the circumstances involved. **McConaughy v. Baxter**, 55 Ala. 379. The Alabama Supreme Court in **W. T. Rawleigh v. Patterson, et al.**, 239, Ala. 309, 195 So. 729, reviewed several aspects with respect to the essentials of a claim for homestead exemption and noted:

"Guided by these principles, we hold that, to constitute a valid claim of homestead, **there must be an occupancy in fact**, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of construction. An undefined, floating intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of **visible character**, or by something equivalent to this." (Emphasis supplied)

Our Supreme Court adopted the language of the Supreme Court of Texas as to certain indicia constituting just what is comprehended by the term "homestead." In **Garrett, et al. v. Jones**, 95 Ala. 96, 10 So. 702, the Court quoted from the Texas case:

"A man's homestead must be his place of residence; the place where he lives; the place where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of home, and where he may enjoy its immunities and privacy.'
. Philleo v. Smalley, 23 Tex. 498."

I am unable to state categorically whether the deeds or instruments you mention are sufficient for a proper claim of homestead, as this is something that you must determine from the facts that actually exist in connection with the claim and the definitions of "homestead" as indicated above.

In conclusion, you of course must use your discretion and understanding in determining as to just what are the facts in any given case submitted to you under a claim for the exemption. I feel that the situations discussed above will be of some assistance to you in meeting these problems relative to the homestead question.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 15, 1966

Honorable Calvin L. Vest, Chairman
Board of Revenue
Cullman County
Cullman, Alabama

Counties — Insane Persons — Sheriffs.

County may pay expenses of one deputed by Judge of Probate to convey resident mental patient to hospital, even though temporarily in another state. — Title 45, Section 211 and Title 11, Section 100 (1), Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have your letter of August 31, 1966, in which you request an opinion of this office as follows:

"We respectfully request immediate opinion as to whether or not the Board of Revenue of Cullman County, Alabama can pay expenses for returning a mental patient from Miami, Florida. He had eloped from Bryce Hospital and after six months period, was officially released. New application has been made and accepted at the hospital. Does the Probate Judge have authority to apply for admittance while the patient is out of state?

"We refer you to the Code of Alabama, Volume 9, Title 45, Section 211, Page 871.

"Your immediate attention will be greatly appreciated."

Your request for opinion actually contains two questions. The second question concerns the authority of the Probate Judge to apply for admittance when a patient is out of the state. This question depends upon a number of jurisdictional facts that would have to be presented to the judge for a judicial decision and should not be answered by this office.

As to your first question; that is, the authority of the county to pay the expenses of one deputed by the Judge of Probate, I answer your question in the affirmative. In so doing, however, I answer with a presumption that the Judge of Probate has found sufficient facts to determine that the patient is insane, a resident of the county, indigent, and temporarily out of the state. The temporary removal of an insane person from the county or the state does not remove the residence nor jurisdiction of the courts. See, in this regard, **Montgomery v. Montgomery**, 236 Ala. 33, 180 So. 709; Quarterly Report of Attorney General, Volume 64, page 79; and 44 Corpus Juris Secundum, Insane Persons, Section 10.

Title 45, Section 211, Code of Alabama 1940, Recompiled 1958, provides as follows:

"The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioners."

In my opinion, there is no distinction to be drawn between an insane person, whether the person be out of the state temporarily or be located within the county, provided all jurisdictional elements are present. Therefore, if the court finds that it may properly exercise its jurisdiction and deposes some person or persons to convey the patient to the hospital, the county may pay the necessary expenses of those (other than the sheriff or his deputies) so deputed. If the sheriff or his deputies are the ones deputed, the provisions of Title 11, Section 100 (1), Code of Alabama 1940, Recompiled 1958 govern over Title 45, Section 211, Code of Alabama 1940, Recompiled 1958, as to the expenses, fees, and allowances involved; and if the sheriff in question is on a salary basis, the same are paid into the county treasury. — Quarterly Report of Attorney General, Volume 54, page 20.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

September 19, 1966

Mr. M. N. Brown, President
The Southeast Alabama Gas District
Post Office Box 271
Andalusia, Alabama 35420

Taxation — Municipalities — Exemption — Licenses.

Exemption from taxation of gas districts organized under the provisions of Act No. 762, Acts of Alabama 1951, Volume 2, page 1319 (Title 37, Section 402(47), et seq., Code of Alabama 1940, Recompiled 1958) as amended by Act No. 694, General Acts 1965, approved September 1, 1965, applies to municipal privilege license taxes for the new license tax year and succeeding years beginning after September 1, 1965, and not to such taxes for the license tax year which included or extended beyond September 1, 1965, or for prior license tax years.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion dated August 26, 1966, is as follows:

"The Southeast Alabama Gas District, a public corporation under the laws of the State of Alabama (herein referred to as 'the District'), respectfully requests your official opinion as to whether the District is liable, under existing statutes, for privilege and license taxes imposed by Alabama municipalities pursuant to the provisions of Sections 735 and 745 of Title 37 of the Alabama Code of 1940, as amended, with respect to periods beginning on and after September 1, 1965.

"The District is a public corporation organized under the provisions of Act No. 762 enacted at the 1951 Regular Session of the Legislature of Alabama (herein referred to as 'the 1951 Act') and is engaged in the sale and distribution of natural gas to customers in several municipalities in the State of Alabama. Section 16 of the 1951 Act was amended by Section 3 of Act No. 694 enacted at the 1965 Regular Session of the Legislature of Alabama, which became effective on September 1, 1965. The said Section 16, as amended, provides as follows:

" 'Section 16. TAX EXEMPTION. All property and all income of any district incorporated under this act, and any such district itself, shall be exempt from all state, county, municipal and other taxation in the State of Alabama, including, without limitation, privilege and license taxation. All bonds of such district and the interest thereon shall be exempt from all state, county, municipal and other taxation in the State of Alabama. All deeds, mortgages, indentures of trust, and other documents executed by or delivered to any such district shall be exempt from all state, county and municipal and other taxation in the State of Alabama provided that these exemptions shall not be retroactive in effect and shall not affect any taxes currently in existence nor any tax previously assessed whether collected or not. Provided further the provisions of this act shall not affect or be applicable to any existing contracts, bonds, supporting taxes or existing exemptions. Nor shall it affect or be applicable to the refunding of any Gas District Corporations now incorporated on an existing debt, taxes or tax exemptions and any municipality or county to continue in the future to levy and collect any tax now levied the passage of this bill notwithstanding.'

"In **Hackleburg v. Northwest Alabama Gas District**, 277 Ala. 355, 170 So. 2d 792 (1965), the Supreme Court of Alabama held that a gas district organized under the 1951 Act was liable for license taxes levied by a municipal corporation on public utilities pursuant to the provisions of Sections 735 and 745 of Title 37 of the Alabama Code of 1940, as amended, with respect to a license tax year beginning **before** September 1, 1965, the effective date of the amend-

ment of Section 16. This decision was re-affirmed by the Supreme Court in **Southeast Alabama Gas District v. Dothan**, 4 Div. 216, Special Term, 1966. Your official opinion is requested as to whether, by virtue of the provisions of **amended** Section 16 of the 1951 Act (effective September 1, 1965), the District is now exempt from privilege and license taxes imposed by municipal corporations pursuant to the provisions of Sections 735 and 745 of Title 37 of the Alabama Code of 1940, as amended, with respect to periods beginning on and after September 1, 1965. The question hereby posed is not, to the knowledge of the District, the subject of any proceeding presently pending in any court of this state."

The answer to your question is found in opinions of this office reported in Quarterly Reports of the Attorney General, Volume 121, page 30, and Volume 122, page 11. In Volume 122, it is stated:

"However, Section 16 of Act No. 762, as amended, *supra*, now reads in part as follows:

" 'All property and all income of any district incorporated under this act, and any such district itself, shall be exempt from all state, county, municipal and other taxation in the State of Alabama, including, without limitation, privilege and license taxation. . . . '

"It is clear that, in the light of the above-quoted portion of said statute, as amended, a municipality is no longer authorized to levy a license tax upon a gas district such as the one to which your request refers. See opinion to Mr. E. L. Smith, Manager, Conecuh-Monroe Counties Gas District, under date of November 16, 1965."

In Volume 121, it is stated:

"With respect to municipal privilege license tax and municipal sales tax, it is my opinion that such gas districts are liable for such taxes which were already levied and in effect on September 1, 1965, the effective date of Act No. 694, *supra*. The last sentence of Section 16, as amended, provides, in part, as follows:

" 'Nor shall it affect or be applicable to . . . any municipality or county to continue in the future to levy and collect any tax now levied the passage of this bill notwithstanding.'

"Under the provisions of Section 16, as amended, *supra*, it is my opinion that such gas districts will not be liable for any municipal privilege license tax or municipal sales tax levied after September 1, 1965, the effective date of Act No. 694, *supra*."

(The syllabus in Volume 121, *supra*, erroneously cites Title 51, section 402(47); the correct citation is Title 37, section 402(47).)

However, upon consideration of your question, it appears that for clarification purposes further comment should be made with respect

to the exemption from municipal privilege license taxes imposed by municipalities pursuant to the provisions of Title 37, sections 735 and 745, Code of Alabama 1940.

Section 735, *supra*, provides, in part, as follows:

"§735. (2154) (1339) License to business, trade, profession, etc.—All municipalities shall have the power to license any exhibition, trade, business, vocation, occupation, or profession not prohibited by the Constitution or laws of the state, which may be engaged in or carried on in the city or town; to fix the amount of licenses, **the time for which they are to run not exceeding one year. . . .**" (Emphasis added.)

The authority of a municipality to levy a license based on gross receipts has been upheld in the cases of **Evers v. City of Dadeville**, 258 Ala. 53, 61 So. 2d 78, and **Al Means, Inc. v. City of Montgomery**, 268 Ala. 31, 104 So. 2d 816.

In view of the provisions of section 735, *supra*, a municipal license tax "cannot run longer than one year." **City of Montgomery v. Montgomery City Lines**, 254 Ala. 652, 49 So. 2d 199. However, in the case of **Woco-Pep Company of Montgomery v. Town of Wetumpka**, 221 Ala. 565, 130 So. 72, it was held that the clause "not exceeding one year" obviously refers to the term of the license, that a municipality may prescribe a license running from year to year until modified or repealed, and that municipal privilege tax ordinances need not be reenacted each year. See also **Estes v. City of Gadsden**, 266 Ala. 166, 94 So. 2d 744.

Although the opinions of this office referred to above do not specifically so state, it is the intention in these opinions to hold and it is so declared by this opinion that the exemption granted in section 16, *supra*, to the gas districts specified therein applies to municipal privilege license taxes for the new license tax year and succeeding years beginning after September 1, 1965, the effective date of Act No. 694, *supra*, and not to such taxes for the license tax year which included or extended beyond September 1, 1965 or for prior license tax years.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

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